

An investment arbitration avalanche after a No-Deal Brexit?

How investors could sue the UK for damages in case Britain leaves the EU without a deal

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On Tuesday, January 15th, an overwhelming majority in the British House of Commons rejected the Brexit deal, i.e. the [Draft Agreement](#) on the withdrawal of the UK from the EU. With an unsuccessful confidence vote just one day later, the UK's future in the EU is now more uncertain than ever. And the Brexit clock continues to tick as the UK is still supposed to leave the European Union on March 29th, 2019.

The rejection of the government's deal has brought anything but clarity into the incredibly complex Brexit saga. From the EU's perspective, there are four different possibilities how things may evolve in the upcoming weeks: Theresa May, or a potential successor as British Prime Minister, could ask the European Council for an extension on Brexit based on [Art. 50 \(3\) TEU](#); unilaterally revoke the withdrawal notification with the effect that the UK would remain an EU Member State; find a way to eventually obtain a majority for the withdrawal agreement and leave the EU under the conditions of the latter; or leave the EU without any deal on March 29th (on the different options see also [here](#)). With the last days' developments, the risk of a no-deal Brexit seems to have significantly increased.

This scenario's consequences are currently hardly foreseeable. The no-deal Brexit – which now more than ever before hangs like a sword of Damocles over the EU and especially the UK – would have unpredictable effects on the British and European economy as well as the UK-EU relations in general. Furthermore, it would not only question but jeopardize the historical achievements of the Good Friday Agreement, which ended the Northern Irish conflict (on possible consequences see also [here](#), [here](#) and [here](#)). But a no-deal Brexit could also trigger another reaction, which has mostly been overlooked in the media coverage on the UK's withdrawal from the EU: an avalanche of investor-State arbitration proceedings against the United Kingdom.

The risk of investment claims after Brexit

While British investors have been one of the [most active group](#) in initiating investor-State arbitrations, the UK itself has so far only been the respondent in [one publicly known investment dispute](#) based on the India-UK BIT. This could fundamentally change with the UK's withdrawal from the EU. Why so?

A no-deal Brexit, but also an organized Brexit, would have major effects on foreign direct investments in the UK – a country which has long been a major recipient of

foreign direct investments due to its historically strong relations with many other countries, formerly part of the British Empire, the English language and culture and especially the fact that the UK is an attractive export platform to the EU market.

Especially companies operating from the UK but selling their goods and services on the European mainland will face major financial losses through a no-deal Brexit, which will fundamentally change the legal environment they are operating in. Moreover, these companies will lose the easy access to over 50 foreign markets with which the EU has concluded economic partnership and trade agreements. But above all, they will lose access to the EU Single Market, the largest integrated economic community in the world with over 500 million middle class consumers. This will not only affect the financial firms in the City of London that rely on the so-called passporting rights of the free movement of capital allowing them a nearly unlimited range of options within the EU Member States' economies (see also [here](#)). But also manufacturing companies such as those in the automobile industry will face major challenges due to the UK's exit from the Single Market. In case of a no-deal Brexit, the UK would automatically fall back on the World Trade Organization's trade rules and thus on the EU's tariffs and quotas for imports from third States. These represent 10% for automobiles and an average of over 35 % for dairy products (see [here](#)). Thus, a no-deal Brexit would challenge the business model of not only British but also many foreign investors that could no longer profit from the EU market but would be left with the much smaller British domestic market. Considering that the EU is the [UK's largest trading partner](#) and the destination of almost 50 % of its exports, one can imagine the dimension of potential imminent losses. Having this in mind, the British International Trade Secretary Liam Fox [explained already in 2017](#) that the government was preparing for any eventuality with regard to upcoming investment disputes, while expressing his hope that the sort of market access reached in a deal with the EU would make such proceedings unnecessary. A no-deal Brexit would frustrate all these attempts.

Intra-EU become Extra-EU Investment Treaties

The UK is currently party to [94 bilateral investment treaties](#) (BITs) – 12 of them with fellow EU Member States – which mostly provide for investor-State dispute settlement in the form of arbitration, and is also a state party to the most invoked international investment agreement (IIA) which is the Energy Charter Treaty. Thus, many foreign investors could rely on this means of transnational dispute settlement to claim damages without the need to rely on the British domestic judiciary. While foreign investors could always rely on these IIAs irrespective of a Brexit, arbitral proceedings based on the 12 BITs with other EU Member States (so-called intra-EU BITs) are facing obstacles as long as the UK is an EU Member State. In its already famous 2018 [Achmea](#) decision, the Court of Justice of the European Union (CJEU) has found investor-State arbitration proceedings based on intra-EU BITs to be incompatible with EU law. This potential obstacle to arbitration, however, would be removed through a no-deal Brexit. The UK would no longer be bound by the CJEU's jurisprudence or the EU Treaties and therefore nothing speaks against investor-State arbitration between investors from the remaining EU Member States and the UK in the absence of an agreement.

A violation of the ‘fair and equitable treatment’ standard?

In the great majority of cases investors are likely to claim a violation of the most blurry and thus controversial standard contained in most IIAs: the ‘fair and equitable treatment’ standard. Its scope continues to be highly debated but is generally understood by arbitral tribunals to reflect fundamental principles such as legality, the prohibition of arbitrariness, legal certainty, due process, proportionality and the stability of legal frameworks. While many arbitral tribunals recognized that the ‘fair and equitable treatment’ standard also protects an investor’s legitimate expectations, the last years have shown an incredible diversity of understandings on what these expectations can comprise and in what circumstances they might have been violated. This becomes especially apparent in the ongoing investor-State disputes initiated against the [Kingdom of Spain](#) in reaction to a change in the Spanish renewable energy regime. While most of these proceedings are still pending, several arbitral tribunals decided in favor of the respondent state (see [here](#) and [here](#)) whereas others decided in favor of the foreign investors, who claimed a violation of the ‘fair and equitable treatment’ standard (see [here](#), [here](#) and [here](#)). These cases can be seen as a warning sign for the UK. While it is difficult to compare the Spanish parliamentary decision over its energy subsidies regime with the UK’s decision to leave the EU, the effects of the latter – in case of a no-deal Brexit – would have much stronger and unanticipated repercussions on the economy than the Spanish developments. Against this backdrop, it cannot be excluded that arbitral tribunals involved in a post-Brexit dispute might establish a violation of the fair and equitable treatment standard. The UK’s potential line of defense, namely to refer investors to the democratic process behind Brexit might not be sufficient to convince the arbitrators as some Spanish cases have shown.

The outcome of post-Brexit investor-State arbitrations are hardly predictable. However, what can be said with some certainty at this point is that many investors will take up any available opportunity to mitigate their losses suffered through a future Brexit. Thus, it is quite likely that in the case of a no-deal Brexit the UK will face an unprecedented amount of investor-State proceedings. And a single decision in favor of a claimant would in any case encourage others to jump on the bandwagon and would thus create a further burden on the UK.

This, beside all the other well-known reasons, should be seen as another argument in order to rethink the entire Brexit endeavor.

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